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No. 402

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, ET AL.,
Petitioners,

vs.

CITY OF CLARKSDALE,
Respondent.

PETITION FOR CERTIORARI TO BE ADDRESSED TO THE SUPREME COURT OF MISSISSIPPI, AND BRIEF IN SUPPORT THEREOF.

H. D. MINOR,
CHAS. N. BURCH,
Counsel for Petitioners.

BLEWETT LEE,
Of Counsel.

LATSCH & ARNOLD - MEMPHIS

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CITY OF CLARKSDALE, Respondent.

PETITION FOR CERTIORARI TO BE ADDRESSED TO THE SUPREME COURT OF MISSISSIPPI, AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

(This case is already in this Court by a writ of error allowed by the Chief Justice of the Supreme Court of Mississippi, and this petition for certiorari is filed out of an abundance of caution and in order that all questions in the case may be brought to the attention of this Court. Page references are to the manuscript copy of record. The original petition contains genuine signatures.)

Your petitioners, The Yazoo & Mississippi Valley Railroad Company (hereafter called the Railroad Company) and the Mississippi Valley Company (hereafter called the Valley Company) and D. A. Scott and E. M. Yerger, sureties on the appeal bond, respectfully show that this litigation was commenced by original bill filed by the City of Clarksdale (hereinafter called the City) in the Chancery Court of Coahoma County, Mississippi, against said Railroad Company. The bill was afterwards amended so as to make the Valley Company a defendant; whereupon arose this

QUESTION IN THE CASE.

The validity of an execution sale of corporate stock by the marshal under an execution issuing from the United States Circuit Court pursuant to a valid judgment by that court against the City. Also the right of the City to make a collateral attack on that sale—particularly after a delay and inaction, with knowledge of the facts, for over nineteen years.

THE CASE STATED.

The original bill (pp. 1-19) was filed against the Railroad Company only. It averred that the City was and had been since April 29, 1891, the legal owner of 250 shares of the capital stock of the Louisville, New Orleans & Texas Railway Company, a corporation of Mississippi, of the par value of $100.00 per share, evidenced by certificate No. 147, dated April 21, 1891; that this certificate had been lost or mislaid and could not be found; that the said L. N. O. & T. Ry. Co. had been consolidated with said Railroad Company (the Y. & M. V.) and that said stock was very valuable; that the City had applied to the Railroad Company for recognition of its rights, which had been declined. There was a

prayer for special and general relief. *The bill made no attack upon the execution sale* presently to be mentioned. It did not refer in any way to that sale nor make the purchaser at the sale a party.

The Railroad Company filed an answer (pp. 22-51) admitting that the stock had been issued to the City, the consideration therefor being $25,000 of the 6 per cent bonds of the City, but that the Valley Company was now the owner of the stock by virtue of a purchase in 1904 in good faith from the Pacific Improvement Company, which had purchased the stock on December 6, 1897, *at an execution sale by the United States Marshal pursuant to a judgment against the City rendered by the United States Circuit Court for the Northern District of Mississippi at Oxford, Miss.* The Valley Company had surrendered the original certificate (representing stock in the L. N. O. & T. Ry. Co.) and secured, in lieu, a certificate for an equal amount of the stock of the Railroad Company (the Y. & M. V.). Various other defenses were set up by the Railroad Company, including laches because no step was taken by the City from Dec. 6, 1897 (the date of the execution sale), until March, 1917, when the present bill was filed; estoppel because of inaction, silence and delay and a failure to exercise any remedy in the court issuing the execution; absence of clean hands; and the statute of limitations. This answer was made a cross bill (p. 41), but at the hearing any relief under the cross bill was waived (p. 168).

The City filed an answer to the Railroad Company's cross bill (pp. 53-64) and its only reference to the execution and sale was to deny in formal terms the allegations of the answer and cross bill in respect thereto (p. 57). However, by proper pleading the City brought in the Valley Company as

a co-defendant (p. 63) and the latter company thereupon filed an answer setting forth the same facts and defenses as the answer of the Railroad Company (pp. 65-70).

There was a decree by the Chancellor granting the complaint full relief, including an accounting (pp. 169-173), and this decree was affirmed without opinion by the Supreme Court of Mississippi March 31, 1919 (p. 181). 81 So. Rep. 178.

JUDGMENT AND FI. FA. VALID.

The City conceded, at the hearing, the validity of the judgment under which the execution issued (p. 89) and the formal regularity of the fi. fa. is not denied.

LEVY OF EXECUTION.

The execution was levied by the marshal by seizing the certificate No. 147, representing the 250 shares of stock in question which has been issued to the City, and by notifying the home office of the corporation (pp. 93, 99). The only question made by the City in this connection was (by argument and not by pleading) that a certificate of stock, being mere indicium of ownership, was not subject to levy. The Mississippi Code of 1870 (which was the Code in effect when the Conformity Act of Congress of 1872 was passed) authorized such a levy.

Rev. Code of Miss. (1871), Sec. 849.

For the convenience of the Court, this section is set out in full, *infra*, p. 21.

The Mississippi Code of 1892, which was the Code in effect *at the time of the execution sale*, but which had never been adopted by the U. S. Circuit Court,

provided for the levy of an execution upon corporate stock by the officer's going to the office or principal place of business of the corporation and there declaring that he attaches or levies upon the stock or shares of interest of the defendant therein at the suit of the plaintiff.

Mississippi Code of 1892, Sec. 3467.

PLACE OF EXECUTION SALE.

The principal, if not the sole, reliance of the City is on the proposition (made in argument and not by pleading) that the execution sale is void because made at the wrong place, for that it was made at the United States Court House in Oxford, Miss., whereas the State statute provided that execution sales must be made "at the court house of the county."

RETURNS ON EXECUTIONS.

The return of the marshal showed his proceedings under the execution and was as follows (p. 93):

> "Executed the within writ this the 13th day of August, 1897, by levying on and taking into my possession one Certificate of stock, the property of said defendant in the Louisville, New Orleans and Texas R. R., Number 147, for 250 shares, issued to the town or city of Clarksdale, Miss. Further executed on this the 6th day of December, 1897, at 12 o'clock meridian by selling said certificate of Stock No. 147 after due advertisement by posting notices in three public places for the period of 10 days as provided by law, to the highest and best bidder for cash, before the Western door of the United States Court House, and post office building in the town of Oxford, Miss., at which sale the Pacific Improvement Co. became the highest and best

bidder, at and for the price of $100.00 and at the same time and place I executed the writ of *vendi exponas* issued to me in this cause and offered for sale all the interest which the City or Town of Clarksdale (Continuation of Marshal's return) had in the Capital Stock of the Louisville, New Orleans & Texas Railway Co. or in the Yazoo & Mississippi Valley Railroad Company, offering said interest at the same time with said certificate of stock to the said Pacific Investment for the said sum of $100.00, that being the highest and best bid offered for same. Dec. 6th, 1897."

Record, p. 93.

A duplicate fi. fa. addressed to the marshal for the Southern District of Mississippi had been issued (p. 96), on which this return was (p. 99):

"Received at Jackson, August 13, 1897, and executed same day by going to the office of the Yazoo & Mississippi Valley Railroad Company in Jackson and there declaring that I attached as levied upon the stock, shares and interests of defendant therein; further by delivering to George Gordin, Agent of the said Yazoo & Mississippi Valley Railroad Company, a true copy of this writ, and demanding of him, by instrument of writing delivered to him, a statement in writing under oath of the amount of the defendant's stock, the number of its shares, and extent of its interest in said railroad company."

(At that time the consolidation of the L. N. O. & T. with the Y. & M. V. had been in effect for some years).

EQUITABLE DEFENSES.

The origin of the whole matter was that, when the L. N. O. & T. Ry. Co. was about to build its Tallahatchie Branch, the City, in order to have that line touch its borders, agreed to take $25,000 of the L. N. O. & T. Ry. Co. stock and pay therefor with $25,000 of its 6 per cent bonds. The line was built in accordance with this agreement, the bonds were issued and the exchange of bonds for stock took place in due course. These bonds passed into the hands of the Pacific Improvement Co. and R. T. Wilson & Co. The City promptly defaulted in the payment of interest and in 1894 the bondholders brought suit against the City in the U. S. Circuit Court at Oxford, Miss., to recover on past due interest coupons. After a prolonged litigation, the case twice going to the Circuit Court of Appeals (74 Fed. Rep. 528; 81 Fed. Rep. 329), there was a final judgment against the City and in favor of the Pacific Improvement Co. for $3,058.13 (p. 89).

In August, 1897, the judgment not being paid, the plaintiff, Pacific Improvement Co., took out an original fi. fa. (p. 90), which was levied on the certificate (No. 147) which represented the 250 shares of stock issued to the City. At the same time, a duplicate fi. fa. issued to the marshal of the Southern District of Mississippi (p. 96). Under these executions, the certificate of stock and all the interest of the City in the L. N. O. & T. Ry. Co. was sold by the marshal at public vendue at the western door of the United States Court House (p. 93), where it was bought in by the Pacific Improvement Co., plaintiff in the execution, for $100.00. (It appears that, at that time, the stock was regarded as of practically no value—p. 122-3). The marshal thereupon de-

livered this certificate to the Pacific Improvement Co., indorsing on the back thereof a formal transfer to that company (p. 77).

Shortly after the judgment was rendered in June, 1897, the officers of the City, apprehending a mandamus, resigned, and the municipal organization was completely disrupted (pp. 117-18). At a mass meeting of citizens a committee of three was appointed to go to New York and settle, if practicable, the whole matter with the bondholders (pp. 117 et seq.). As a result, an agreement was reached in New York by which the bondholders transferred the bonds and also the judgment to the Planters Bank of Clarksdale in consideration of the cash payment of $25,000 (pp. 160-164). Immediately, the governor appointed new officials for the City and the municipal organization was restored. At the first council meeting, the action of the committee in New York was ratified and the City made an agreement by which it was arranged to reimburse the Planters Bank for the money it had expended (pp. 107-114). All of this occurred in the latter part of June and the early part of July, 1898 (pp. 113-114). Mr. J. W. Cutrer, one of the committee mentioned, and a lawyer of recognized ability (p. 119), represented the City in the litigation heretofore referred to, was elected City Attorney (a public office) upon the reorganization in June, 1898, and remained such for many years thereafter (p. 119). He, of course, was cognizant of all that had occurred. He was never called as a witness by the City at the trial of the present case.

As a result of this adjustment, the bondholders lost, and the City escaped the payment of, over $13,000 of accrued interest.

From the time of the execution sale in December, 1897, nothing whatever was done by the City until

the filing of the present bill in March, 1917, except that two or three former Mayors of the City testified on the hearing of this case that they made inquiries about this stock (pp. 130-136). There is no claim that either the Railroad Company or the Valley Company were ever approached on the subject until about the time the bill was filed in 1917.

During that interval the Valley Company purchased the stock in question from the Pacific Investment Co. in 1904, surrendering the certificate No. 147 (which represented stock in the L. N. O. & T. Ry. Co.) and secured instead a certificate for an equal amount of stock in the Railroad Company, with which the L. N. O. & T. Ry. Co. had been consolidated in 1892, shortly after the original issuance of the stock (p. 105).

In that interval, Mr. W. A. Percy, who represented the bondholders in the litigation in the Circuit Court of the United States at Oxford, died, his death occurring about 1914 (p. 120).

There was no effort by the City to show that it had attempted to pursue any remedy whatever in the Court from which the execution issued.

SPECIFICATION OF ERRORS.

Your petitioners now aver the following plain errors were committed by the Mississippi Supreme Court in its final decree of this case:

1. In adjudging that the execution sale under which the Valley Company's vendor (the Pacific Improvement Co.) acquired title to the stock in question, was void and, therefore, subject to collateral attack, in refusing to dismiss the bill; and in adjudging costs against petitioners.

2. In adjudging that the applicable law respecting said execution sale was not the Act of Congress of March 3, 1893 (27 Stat. L. 751) under which a sale at the Federal Court House door instead of the county court house door is an irregularity merely, but that the controlling statute was the Mississippi statute under which an execution sale at a place other than the county court house is void.

3. In refusing to adjudge that the failure of the City to exercise its remedies in the court issuing said execution (one of which remedies had not long before been pointed out by Mr. Justice Lamar in Bornemann v. Norris, 47 Fed. Rep. 438) was a bar to the City's rights to maintain this bill filed nearly 20 years after the execution sale.

4. In adjudging that the City (the complainant) was not estopped by laches and by silence, although the execution sale occurred December 6, 1897, and no step was taken by the City to assert its right until the filing of the original bill herein in March, 1917—nearly twenty years later, during a large part of which time the official city attorney was a lawyer of ability, who had represented the city in the original litigation which had resulted in the execution and therefore knew all the facts.

5. In adjudging that the City was not precluded from relief in a court of equity by the maxim of "clean hands," when the facts were that the City had gotten this stock by issuing $25,000 of its bonds, had promptly failed to pay the interest thereon and, after a judgment establishing its liability, had sought to escape payments by dissolving its corporate organization—as the result of all of which it practically forced the bondholders to a settlement under which they lost, and the City escaped the payment of, over $13,000 of unpaid past due interest.

6. In adjudging that the City made sufficient proof of its title to the stock in question to enable it to maintain this suit, when, in fact, a serious doubt existed as to its title. For when the committee representing the citizens of Clarksdale went to New York to meet the bondholders, with a view to settlement, at least one of the committee, Mr. Cutrer, was thoroughly cognizant of all the facts and knew that the Pacific Improvement Co. claimed and actually held the stock by virtue of the execution sale. In the settlement reached (which was promptly ratified and adopted by the City—p. 108 et seq.), nothing whatever was said about the stock and the City allowed, without protest, the Pacific Improvement Co. to retain the stock and made no complaint until nineteen years later, when this bill was filed. All this raises a fair presumption that all parties intended that the Pacific Improvement Co. should retain the stock and that the City waived any claim it may have had—thus creating such a doubt with respect to the City's title to the stock as will preclude it from maintaining its bill.

PRAYER.

Your petitioners refer to the certified copy of the record and all the proceedings in this cause now on file in this Court under the writ of error already sued out from this court to the Supreme Court of Mississippi in this cause, and pray that a writ of certiorari be issued out of and under the seal of this court directed to the Supreme Court of the State of Mississippi and the judges thereof, commanding the said court to certify and send to this court a full and complete transcript of the record and all proceedings of said Mississippi Supreme Court in this cause entitled "The Yazoo & Mississippi Valley Railroad Company and Mississippi Valley Company v. City of Clarksdale," and being No. 20542 on the

docket of said Mississippi Supreme Court, to the end that this cause may be reviewed and determined by this court. And your petitioners further pray that the record and proceedings already on file in this court, under the writ of error heretofore granted, may be taken as a return to said writ of certiorari, and that your petitioners may have such other and further remedies and relief in the premises as to this Court may seem appropriate and in conformity with law, and that the decree of the Mississippi Supreme Court in this cause and every part thereof be reversed by this Honorable Court and remanded to the Supreme Court of Mississippi with direction to dismiss the original bill herein.

And your petitioners will ever pray, etc.

H. D. MINOR,

CHAS. N. BURCH,
Solicitors for Petitioners.

BLEWETT LEE,
Of Counsel.

H. D. Minor, being duly sworn, says that he is one of counsel for petitioners in the above cause, that he prepared the foregoing petition and that the allegations therein are true as he verily believes.

H. D. MINOR.

Subscribed and sworn to before me on this the 2nd day of June, A. D. 1919.

E. C. TURNER, Notary Public.
My commission expires Jan. 17, 1923.

I certify that in my opinion the foregoing petition is well founded in law.

H. D. MINOR,
Solicitor for Petitioners.

BRIEF.

1. The case at bar presents a federal question for that there is involved the validity and effect of an execution sale made pursuant to a judgment of the Circuit Court of the United States for the Northern District of Mississippi under an execution issued by that Court. There is also involved the application, interpretation and effect of the Act of Congress of March 3, 1893 (27 Stat. L. 751). These federal questions were presented to the trial court and also insisted upon in the Supreme Court of Mississippi.

Tullock v. Mulvane, 184 U. S. 497;
Cooke v. Avery, 148 U. S 390;
Clements v. Berry, 11 How. 398;
Gregory v. McVeigh, 23 Wall. 294;
Record, pp. 35-36, 69, 168, 176-180.

2. The judgment pursuant to which this execution sale was made was concededly valid and was rendered by a federal court (p. 89) and there is no claim that the fi. fa. was irregular or invalid. On the contrary, it affirmatively appears that the fi. fa. and duplicate fi. fa. under which the execution sale was made, are regular on their face.

Record, pp, 90, 96.

3. The right to levy an execution on this certificate of stock existed under the Mississippi Code of 1871 (the Code in effect when the federal conformity act of 1872 was passed) and by virtue of the Act of Congress (the Conformity Act) of June 1, 1872 (R. S., Sec. 916). The Mississippi Code of 1892 is not applicable because there is no proof that any Mississippi statute subsequent to 1872 was adopted by any "general rules" of the federal court issuing the execution or otherwise. The existence of such rules has not been proven and cannot be presumed.

Rev. Code of Miss. (1871), Sec. 849;
Boyle v. Zachrie, 6 Pet. 659;
Gen. Electric Co. v. Hurd, 171 Fed. Rep. 984.

4. The fact that the execution sale took place at the door of the Federal Court house instead of the door of the court house of the county—the latter being the place for execution sales under the Mississippi statute—does not render the execution sale void, for that the law governing the place of sale under the federal execution is the Act of Congress of March 3, 1893 (2 Stat. L. 751) and not the Mississippi statute, because that act of Congress contemplates judicial sales and was designed to fix a uniform rule for judicial sales under decrees or judgments of federal courts. And an execution sale is a judicial sale.

3 *U. S. Comp. Stat.* (Ann.) 1916, Sec. 640-41;
Re Brittania Mining Co., 203 Fed. Rep. 452;
Piano Co. v. Hennington, 98 Miss. 51;
Seymour v. Association, 116 Ga. 285.

5. While the Act of Congress of March 3, 1893, provides that judicial sales shall be made at the court house of the county, the fact that this execution sale was made at the front door of the federal court house in the county does not render the execution sale void but, at most, was an irregularity which cannot be available to collateral attack. The statutory requirement as to place of sale was directory and not mandatory.

Lansburgh v. M'Cormick (C. C. A.), 224 Fed. Rep, 879;
Street v. Larkin, 77 Ala. 580.

6. The claim of defendant in error that the execution sale in question at which the vendor of the present holders of the stock acquired title was void

because of a failure to advertise the sale as required by statute, is not sound for that a failure to follow strictly the statutory requirement as to advertisement is a mere irregularity which would not be available on collateral attack. The provisions of the statute in that respect are directory purely. Such is the well established rule even in Mississippi.

Cole v. Bridges, 45 Miss. 257;
Nevada Syndicate v. Nickel Co., 103 Fed. Rep. 396, affirmed 112 Fed. Rep. 44, 184 U. S. 700;
McBride v. Gwynne, 33 Fed. Rep., 202;
Rounsaville v. Hazen, 33 Kan. 71, 76;
Conley v. Redwine (Ga.), 35 S. E. Rep. 92;
Doe v. Jackson, 51 Ala. 514, 517.

7. The purchaser at an execution sale depends on the judgment, the levy and the transfer of the stock certificate to him by the marshal. "All other question are between the parties to the judgment and the marshal."

Wheaton v. Sexton, 4 Wheat. 503.

8. The original and amended bill in this cause is a collateral attack on the execution sale in question, the plaintiff in the execution and the purchaser at that sale not being before the court and no direct assault being made in any pleading upon the irregularity of said sale. The irregularities in the execution sale are not available on collateral attack.

Lansburgh v. M'Cormick (C. C. A.), 224 Fed. Rep. 879;
Rounsaville v. Hazen, 33 Kan. 71, 76;
Keystone Collieries v. Mudge, 256 Pa. 130;
1 *Am. Law Rep. Ann.* (1919) 1433.

9. The execution sale in question being pursuant to a judgment of the United States Circuit Court, the remedy of the defendant in the execution was by a proceeding in that court, a remedy which has been pointed out by Mr. Justice Lamar only a few years before the sale (Bornemann v. Norris, 47 Fed. Rep. 438). The failure of the defendant in error here (the defendant in the execution) to pursue that remedy or to exercise any other remedy in the federal court within a reasonable time is and was a bar to the present suit.

Bornemann v. Norris, 47 Fed. Rep. 438;
Seaman v. Ins. Co. (C. C. A.), 86 Fed. Rep. 493;
Kirk v. Hamilton, 102 U. S. 68;
Cunningham v. Cassidy, 17 N. Y. 282;
Quarles v. Hearn, 70 Miss. 895.

10. Where the purchaser at the execution sale fails to avail himself of the remedies in the court issuing the execution or elsewhere, but remains silent, he will not be heard after a long lapse of time, and after intervening rights have accrued, to aver that the execution sale was void. In the case at bar the execution sale occurred December 6, 1897. The plaintiff in error, the Mississippi Valley Company, purchased the stock in 1904 from the purchaser at the execution sale. Nothing was done by the City, defendant in the execution, until the filing of the present bill in March, 1917—nearly 20 years after the execution sale.

Record, pp. 19, 93, 134.
Griffith v. Bogert, 18 How. (U. S.) 158;
U. S. v. Lane, 39 Sup. Ct. Rep. 294;
Nat. Nickel Co. v. Nevada (C. C. A.), 112 Fed. Rep. 44, 48.
Harrington v. O'Reilly, 9 S. & M. 218.

11. An execution defendant who accepts any part of the proceeds of the execution sale, either directly or indirectly, (in this case by credit on the cost bill) or in any other way acquiesces in the sale, is thereby estopped from questioning the validity of the sale, and this is true whether the sale be void or merely invalid for "it is a well-settled elementary principle that a void judicial sale is an exception to the rule that 'a confirmation or ratification cannot strengthen a void estate.' "

Fallon v. Worthington, 13 Colo. 569;
Freeman on Void Judicial Sales, sec. 50;
Kleber's Void Jud. & Ex'n Sales, secs. 474, 476;
Clark v. Glos, 180 Ill., 568.

12. Where a sale is made under several executions, the sale is valid if good under any of them.

Pickett v. Bank, S. & M. (Miss.) 470;
Lane v. McLian, 9 S. & M. (Miss.) 287;
Hand v. Grant, 10 S. & M. (Miss.) 517;
Shepherd v. Dolph, (Ky.) 58 S. W. 991.

13. In order to maintain a bill of the character here involved, complaint must show a perfect legal or a perfect equitable title and failing to do so, the bill must be dismissed without regard to whether the title of the defendant be good or bad.

Jones v. Rogers, 85 Miss. 803;
Bank v. Evans, 10 S. & M. (Miss.) 35.

(a) Conceding for the moment, and for the sake of argument only, the City's contentions as to the invalidity of the execution sale, there clearly remains a doubt whether the Pacific Improvement Company's right to retain the stock was impliedly conceded and the City's claim thereto waived by

the settlement reached in New York by a committee, and afterwards ratified by the City, under which the bondholders lost over $13,000 of accrued interest, due by the City, at which settlement the matter of this stock was not mentioned, but the fact was that the Pacific Improvement Co. was then holding and claiming the stock, which fact was then well known to one of the committee (Mr. Cutrer), who had been attorney for the City in the litigation resulting in the execution and who was the City's official attorney for many years afterward.

Record, pp. 111-113, 119.

(b) The inaction of the City for nearly twenty years after the execution sale, and after the settlement referred to, during most of which time the attorney who represented the City in the litigation which resulted in the execution, was the official city attorney, is explainable upon no other theory than that it was understood by the parties that, by the settlement mentioned, the City abandoned its claim to the stock and thus created, at the least, a serious doubt, as to complainant's title.

Record, p. 119.

14. The complainant (defendant in error) came not with clean hands for that the City repudiated its bonds which it had given for the stock, contested for several years a suit on the bonds and, when judgment was rendered for interest due thereon—thus establishing the validity of the bonds—the City disrupted its organization to avoid a mandamus. By these means it forced the bondholders to a settlement by which they lost over $13,000 of accrued interest. Under such circumstances complainant will be repelled in a court of equity.

Record, p. 113.

Galloway v. Finley, 12 Pet. 264.

15. In its ownership of this stock the City was not acting in a governmental capacity, but as an individual. This rule is well settled with respect to Mississippi municipalities.

Adams v. Railroad, 76 Miss. 714;
Hinds Co. v. Railroad, 85 Miss. 631.

The City was therefore subject to the rules just stated with respect to laches and estoppel.

We, therefore, respectfully submit that the case should be reversed and remanded to the Supreme Court of Mississippi with directions to dismiss the bill.

H. D. MINOR,

CHAS. N. BURCH,

For Petitioners.

BLEWETT LEE,

Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, ET AL., Petitioners.

vs.

CITY OF CLARKSDALE, Respondent.
IN RE: PETITION TO SUPREME COURT OF THE UNITED STATES FOR WRIT OF CERTIORARI IN ABOVE CASE.

To Messrs. Maynard & Fitzgerald,
Clarksdale, Miss.

Please take notice that on Monday, October 6, 1919, at noon, or as soon thereafter as counsel may be heard, the foregoing petition and brief will be submitted to the Supreme Court of the United States at its usual place for holding its session at the Capitol at Washington, D. C., for its consideration and action.

H. D. MINOR,
Attorney for Petitioners.

We acknowledge service of a copy of the foregoing petition, brief, and notice, this June —, 1919.

.....

Attorneys for City of Clarksdale.

"Sec. 849. Bank notes, bills, or evidences of debt, circulating as money, or any share or interest in any incorporated company, belonging to the defendant in execution, may be taken and sold, by virtue of an execution, in the same manner as goods and chattels, or applied to the payment of the execution; and the clerk, cashier, or other officer having the custody of the books of the company, shall, upon exhibiting to him the writ of execution, be bound to give to the officer having such writ, a certificate of the number of shares or amount of the interest held by the defendant in such company, and if he shall neglect or refuse to do so, or if he shall wilfully give a false certificate thereof, he shall be liable to the plaintiff for double the amount of all damages occasioned by such neglect or false certificates, to be recovered in an action on the case against him. The purchaser of such share or interest, at such sale, shall become the owner thereof, in the same manner as if such share or interest had been regularly assigned to him by the defendant."

Revised Code of Miss. (1871), Sec. 849.

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Office Supreme Court, U. S.
FILED
SEP 30 1919
JAMES D. MAHER,

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

NO. 4[redacted]15

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY;

MISSISSIPPI VALLEY COMPANY;

D. A. SCOTT, and

E. M. YERGER, Plaintiffs in Error.

vs.

THE CITY OF CLARKSDALE, Respondent.

MOTION TO DISMISS THE PETITION FOR WRIT OF CERTIORARI AND BRIEF THEREON.

GERALD FITZGERALD
GEORGE F. MAYNARD
Solicitors for Respondent.

THE CHALLENGE, CLARKSDALE, MISS.

LIST OF CASES CITED IN BRIEF.

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Merchants Bank vs. Evans, 51 Mo. 343	10
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Page vs. Turk, 43 Okla. 675 (143 Pac. 1049)	10
Phila. & Reading Coal & Iron Co. vs.Gilbert, 245 U. S. 162	8-12

venient place; and, cattle, sheep, or stock,

Sinclair vs. Stanley, 64 Tex. 67 ---------- 10
Smith vs. Cockerill, 6 Wall. 756 ---------- 10
Smith vs. Vulcan Iron Works, 165 U. S. 518 13

Tolbert vs. State Bank, 30 Okla. 407 (121 Pac. 212) ---------- 10

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IN THE SUPREME COURT OF THE UNITED STATES.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, ET AL., Petitioners,

vs.

The CITY OF CLARKSDALE, Respondent.

IN RE: MOTION TO DISMISS PETITION FOR WRIT OF CERTIORARI.

Now comes the respondent, by its solicitors, and moves the Court to dismiss the petition for Writ of Certiorari herein because:

First: In this cause there has been no final judgment or decree rendered or passed by the highest Court of the state in which a decision could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States and that decision is not in favor of their validity, nor has there been drawn in question in this cause the validity of a statute of or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, the decision being against their validity; Nor is there

in this cause any title, right, privilege or immunity claimed under the constitution or any treaty or statute of or commission held or authority exercised under the United States, espcially set up or claimed by either party.

Second: There is no Federal question involved in this cause.

Third: This cause was decided upon the construction of State Statutes upon which the decision of the State Supreme Court is conclusive.

Fourth: This cause was decided upon sufficient grounds upon which to base the decision regardless of any Federal questions involved.

Fifth: No Federal question was decided in this cause; and, if decided, then within the law.

Sixth: If any right, title, privilege, or immunity claimed under the constitution or any treaty or statute or commission held or authority exercised under the United States, is involved in this cause then same was not "espcially set up or claimed" by petitioners.

Seventh: The only Federal question which it is claimed to be involved in this cause is stated in specification of error No. 2, p. 10 of the petition of Certiorari, to-wit: (Miss. Supreme Court erred in its final decree) "2. In adjudging that the applicable law respecting said execution sale was not the Act of Congress of March 3, 1893 (27 St.L. 751) under which a sale at the Federal Court House door, instead of the county Court House door is an irrgularity, merely, but that the control-

ling statute was the Mississippi statute under which an execution sale at a place other than the county court house is void." And said specification of error is plainly patent to be without merit as shown by the face of the petition.

Eighth: The error assigned is frivolous and not of sufficient importance to the merits of the case to cause the issuance of a Writ of Certiorari from the Supreme Court of the United States.

Ninth: And for other apparent reasons.

Respectfully submitted,

GEO. F. MAYNARD

GERALD FITZGERALD

To the Hons. Chas. N. Burch and H. D. Minor, solicitors for petitioners; the Yazoo & Mississippi Valley Railroad Co.; the Mississippi Valley Company; D. A. Scott and E. M. Yerger, petitioners:

You wil please take notice that in answer to your petition for Certiorari to be addressed to the Supreme Court of Mississippi in the case of the Yazoo & Mississippi Valley Railrad Company, et al., Petitioners, vs. City of Clarksdale, Respondent, that the respondent will, on Monday, October 6, 1919, at noon, or as soon thereafter as counsel may be heard, submit the foregoing motion to dismiss the said petition for Writ of Certiorari and for a denial of the same.

GEO. F. MAYNARD

GERALD FITZGERALD

Solicitors for Respondent.

STATEMENT OF THE CASE AND BRIEF.

There is involved in this cause the title to two hundred and fifty (250) shares of the stock of the L., N. O. & T. Ry. Company, now consolidted with the Yazoo & Mississippi Valley Railroad Company, issued to the City of Clarksdale on April 29, 1891. The original bill was filed against the Yazoo & Mississippi Valley Railroad Co. asking for the reissuance of this stock and alleging that the same had been lost, destroyed or stolen. The defendants, the Yazoo & Mississippi Valley Rail road Company, answered, admitting the ownership of the stock in the City of Clarksdale up to the date of December 6, 1897, upon which date it was alleged by the defendant railroad company that the said stock was sold by the Marshal of the United States Circuit Court for the Northern District of the State of Mississippi at Oxford, Mississippi,in front of the Federal Court building by virtue of an execution issued on a valid judgment against the said City of Clarksdale; and that the Mississippi Valley Company, a holding corporation, owner of the Yazoo & Mississippi Valley Railroad Company, had since purchased said stock and was at the date of suit the owner thereof.

The cause thereupon went to trial and upon the introduction of the returns of the execution, the City of Clarksdale, admitting the validity of the judgment, attacked the sale collaterally for the following reasons:

To the execution marked exhibit "HDM No. 2",

record page 54, the following objections were made:

"First, that the return on said execution does not show proper levy; Second, that the return on its face shows that the property levied on was sold at the wrong time and wrong place and in an improper manner; Third, that the return attempts to show the execution of a writ of venditioni exponas on which paper alone the return could be made, and because the return is truly and absolutely void as to the actual sale and delivery of any of the share, interest or stock of the City of Clarksdale in and to the L., N. O. & T. Ry. Co. or the Y. & M. V. Rilroad Co.; because the return is not in conformity with the statutes of the State of Mississippi in regard to the levy and sale of such property in any respect; because the return does not show any authority by law to make such a levy as is alleged to have been made or to make such a sale as is attempted to be shown by the return." (Record P. 57.)

To the execution marked "HDM No. 6", page 58 of the record, the City of Clarksdale made the following objections, (rec. p. 60):

"Because the paper is incompetent, immaterial and irrelevant; because the return does not show any sale; because the return is made or proposed to be made by Deputy United States Marshal of the Southern District of Mississippi, and no sale is alleged to have been made by him; because no levy is shown by the execution as required by the Statutes of Mississippi or the law in force at the time as acknowledged and acted upon by the United States Court in the districts of Mississippi;

because the return is void except as a return "nulla bona" ad shows on its face that no action was taken by the officer."

Upon these objections, the Chancery Court of Coahma County, Mississippi, before whom the case was then being tried, ruled the evidence out and gave judgment in favor of the complainant for the possession of the stock. The case was thereupon appealed to the Supreme Court of the State of Mississippi and affirmed without opinion. Whereupon, the petitioners, defendants as aforesaid, have prayed this court for a Writ of Certiorari to be addressed to the Supreme Court of the State of Mississippi.

In praying for the Writ of Certiorari, the sole Federal question alleged is as follows: (The Supreme Court of Mississippi erred)

"No. 2. In adjudging that the applicable law respecting said execution and sale was not the Act of Congress of March 3, 1893 (27 stat. L. 751), under which a sale at the Federal Court House door instead of the county Court House door is an irregularity, merely, but that the controlling statute was the Mississippi statute under which an execution sale at a place other than the County Court House is void."

The Act referred to is as follows:

"An act to regulate the manner in which property shall be sold under order or decree of any United States Court.

Sec. 1. (Real estate, how sold under order or

decree of Court) That all real estate or any interest in land sold under any order or decree of any United States court shall be sold at public sale at the Court House of the county, parish or city in which the property or the greater part thereof is located, or upon the premises as the Court rendering such order or decree may direct.

Sec. 2. (Personal property) That all personal property sold under any order or decree of any Court of the United States shall be sold as provided in the first section of this act, unless in the opinion of the Court rendering such order or decree, it would be best to sell it in some other manner."

Record pages hereinafter referred to are pages of the record in No. 402, October Term, 1919, being the record sent up on Writ of Error in this same cause.

As counsel makes no other specifications of error upon which the Supreme Court of the United States can base the issuance of a Writ of Certiorari, we will base our entire argument on his second specification, page 10 of the petition for Certiorari above quoted, and not seek to follow him in his peregrinations through the mazes of his so-called equitable reasoning.

Under the Act of September 6, 1916, chapter 448, 39 Stat. L. 726 amending section 237 of the Judicial Code it is provided that a "final judgment or decree in any suit in the highest Court of the State in which a decision of the suit could be had, where is drawn in question the validity of a treaty or a statute of, or authority exercised under the United States; and the decision is against their validity, or where is drawn in question the validity

of a statute of, or an authority exercised under any state on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of the validity "that the same might be re-examined and reviewed or affirmed in this Court upon a Writ of Error; but only where "any title, right, privilege or immunity is claimed under the constitution or any treaty or statute of, or commission held or authority exercised under the United States and the decision is either in favor of or against the title, right, privilege or immunity, especially set up or claimed, by either party, under such constitution, treaty, etc." Can this Court examine and disaffirm or reaffirm a decision of the State Supreme Court by Writ of Certiorari?

"The difference between the two modes of securing the review as contemplated by the statutes lies in the fact that a Writ of Error is granted as of right, while a Writ of Certiorari is granted or refused in the exercise of sound discretion."

Reading Coal & Iron Co. vs. Gilbert, 245 U. S. 162

In exercising the sound discretion spoken of by Justice Vandevanter in the Reading Coal & Iron Co. case, this Court must ncessarily in considering the petitin for Certiorari examine somewhat the grounds upon which the petition is based. And unless the grounds set forth in the petition are of sufficiently grave a nature to warrant the issuance of this unusual writ, the petition will be denied.

Specifications of error No. 2, page 10 of the petition is on its face a frivolous assignment of error.

The Act of March 3, 1893, Chap. 225, 27 Stat. L. 751 has no application whatever to a sale of

ands or personal property under execution, but is merely an act to regulate the manner in which property shall be sold under **order** or **decree** of any United States Court. The United States Court made no order or decree in this cause as shown by the Clerk's certificate (Record p. 93) so that if the above statute did apply, which of course it does not, the sale would still have had to have been made at the county Court House and not in front of the Federal Court building. As will be seen upon examination, this statute is no part of the common law procedure nor is it incorporated in the Judicial Code as compiled March 3, 1911. As said by the Court in re: LaFrace Copper Co. 205 Fed. Rep. 207, "The Act of March 3, 1893, R. S. 751, seems to relate to judicial sales pursuant to some order or decree, creating or declaring the right to sell and which right could not be exercised but for the order or decree; sales necessarily authorized and ordered by the Court; sales void but for such order or decree; sales divesting the title of the former owner."

And in the case of Landsburg vs. McCormick, 224 Fed. Rep. 874, the Court said:

> "Indeed the Court recognizes and distinguishes the case of Godchaux vs. Morris. The cases holding sales made by merely ministerial officers at a place not authorized by statute to be void obviously stand on a different foting."

We submit, on the whole, that it is too plain for argument to this Court that the Act of March 3, 1893, sec. 751 R. S. has no reference whatever to sales made under execution, but only refers to

sales made under order or decree of any United States Court.

The cause below was tried upon the objections hereinabove stated to the evidence of the sale made by the Marshal under the Mississippi Statutes with reference to sales made under execution. The Lower Court and the Supreme Court of Mississippi in construing the State Statutes held that a sale of personal property made in front of the Federal Court House instead of the County Court House by virtue of execution issued and in the absence of any order or decree was utterly and absolutely void and subject to collateral attack, and they had as their authority the following cases:

Cole vs. Bridges, 45 Miss. 257.

Jones vs. Rogers, 85 Miss. 802.

Moody vs. Moeller, 13 Am. St. Rep. 839.

Sinclair vs. Stanley, 64 Tex. p. 67.

Smith vs. Cockerill, 6 Wallace 756.

Angel vs. Byers, 153 Ky. 214. (154 SW 1111)

Page vs. Turk, 43 Okla. 675. (143 Pac. 1049)

Talbert vs. State Bank, 30 Okla. 407. (121 Pac. 212)

Hancock vs. Youree, 25 Okla. 463. (106 Pac. 842)

Merchants Bank vs. Evans, 51 Mo. 343.

Capital Bank vs. Huntoon, 35 Kan. 592. (11 Pac. Rep. 377)

"Under the laws of the United States re-

lating to the sales of property taken under execution in commn law cases pending in the Circuit Court, defendant in execution is entitled to have the sale of land seized under execution made at the door of the Court House of the county in which it is situated."

Borneman vs. Norris, 47 Fed. Rep. 438.

The only question involved in this cause is the construction of the state statute by the State Supreme Court and such construction is binding upon the Supreme Court of the United States unless some act of Congress is opposed thereto.

"Where the construction given by the highest Court of the State to the construction of the statute of the state has been uniform and is settled, it is binding upon the Courts of the United States as a rule of decision.

Webster vs. Cooper, 14 Howard 488.

'As a rule,the Supreme Court of the United States treats the construction which the highest Court of the state has given to a statute of that state as a part of the statute."

Douglass vs. Pike County, 101 U. S. 678.

"The construction of a State statute is to be accepted by the Federal Court in determining whether the State statute violates the Federal constitution."

Cargill Co. vs. Minesota, 180 U. S. 452.

'The decisions construing the practice acts

of the State are binding upon the Courts of the United States.'

At. & Pac. R. R. Co. vs. Hopkins, 94 U. S. p. 12;

McGoon vs. Scales, 9 Wall. 23.

If counsel were right in his assertion that the Act of March 3rd, 1893, Section 751, R. S., is the applicable Act, which is strenuously denied, even then he would have no ground for asking a writ of certiorari,because without a special order or decree naming place of sale it is incumbent that property sold under such order or decree be sold at the County Court House, and this mandatory.

Cumberland Lbr. Co. vs. Tunis Lbr. Co. 171 Fed. p. 352.

In passing the act of September 6th, 1916, Chapter 448 (39 Stat. L. 726) which amends Section 237 of the Judicial Code, and which provides for re-examination and review by the Supreme Court of the United States by writ of certiorari in the cases therein specified, it is certain that Congress intended that the sound discretion of the Supreme Court of the United States should be used in directing the issuance of this unusual writ. In fact, this is the construction put on said Act by Justice Vandevanter in the case of

Phila. & Reading Co. vs. Gilbert, 245 U. S. 162.

It would also appear that in passing this amendment to Section 237 of the Judicial Code, Con-

gress evidently had in mind former decisions of the Supreme Court of the United States in which it was held that the writ of certiorari is one sparingly to be used and will only be exercised when the circumstances of the case show the importance of the question involved; to avoid the necessity of conflicting decisions or some matter affecting the interest of the nation.

Forsythe vs. Hammond, 166 U. S. 506.
Smith vs. Vulcan Iron Works, 165 U. S. 518
American Constr. Co. vs. Jacksonville etc., 148 U. S. 372

Where it is so patent,as is the case here,that the statutes of the United States (Act March 3, 1893, R. S. 751) which counsel claims are applicable, can in no aspect of the case have any effect on the decision of this Court, or of the Mississippi Supreme Court, then the writ will certainly be denied.

It is deemed useless to go into the merits of this cause and weary the Court with the numerous equitable defences, such as lasches and the Statute of limitations,, which can not affect a Municipality in the State of Mississippi, since the adoption of Section 104 of the Constitution of 1890 of the State of Mississippi, which provides—"Sec.104—Statute of Limitations in civil causes shall not run against the State or any sub-division, or municipal corporation thereof."

We respectfully submit that the writ of cer-

tiorari herein prayed for should be denied.

GEO. F. MAYNARD

GERALD FITZGERALD

STATE OF MISSISSIPPI.
COUNTY OF COAHOMA.

This day personally appeared before me, the undersigned, a duly qualified and acting Notary Public within and for the County and State aforesaid, Gerald Fitzgerald, who having been by me first duly sworn, states on oath that he is a member of the Bar of the Supreme Court of the United States, and that he has heretofore, on the 20th day of September, 1919, sent by registered mail to Hons. H. D. Minor and Chas. N. Burch, solicitors for the Plaintiffs in Error, at their post-office address, in Memphis, Tennessee, a full, true and correct copy of the foregoing motion to dismiss the petition for Writ of Certiorari herein and the Brief thereon.

GERALD FITZGERALD

Sworn to and subscribed before me this the 20th day of September, A. D. 1919.

E. J. MULLEN,
Notary Public.

Office Supreme Court, U. S.
FILED
OCT 4 1919
JAMES D. MAHER,
CLERK.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, ET AL., PETITIONERS,

vs.

CITY OF CLARKSDALE, RESPONDENT.

No. [redacted]

REPLY TO MOTION TO DISMISS PETITION FOR WRIT OF CERTIORARI.

H. D. MINOR,
CHARLES N. BURCH,
Solicitors for Petitioners.

BLEWETT LEE,
Of Counsel.

LATSCH & ARNOLD - MEMPHIS

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1919.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, ET AL.,
Petitioners,

vs. No. 402.

CITY OF CLARKSDALE,
Respondent.

REPLY TO MOTION TO DISMISS PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

As we read the rules of the Court there is no such practice as a motion to dismiss the petition for certiorari, but the only proceeding open to the respondent is to file a reply brief.

No further answer, therefore, is deemed necessary to this motion except respectfully to call the attention of the Court to the fact that this case is also in this Court on writ of error to the Supreme Court of Mississippi, allowed by the Chief Justice of that Court. With respect, therefore, to the brief filed in support of this motion to dismiss our petition for certiorari we are content to rely on our brief in support of the petition for certiorari already on file and our brief on the writ of error.

Respectfully submitted,
H. D. MINOR,
CHARLES N. BURCH,
Solicitors for Petitioners.

BLEWETT LEE, of Counsel.